

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Melvin Pearl, Plaintiff

AND:

Morris Krandel, Defendant

BEFORE: Associate Justice Jolley

COUNSEL: Andrew Locatelli, counsel for the moving party plaintiff

James Macdonald and Ian Chesney, counsel for the proposed defendant
responding party Continental Casualty Company

HEARD: 2 February 2026

REASONS FOR DECISION

- [1] The plaintiff seeks leave to add the defendant’s professional liability insurer, Continental Casualty Company (“CCC”), as a defendant in this action.
- [2] His stated reason for doing so is that CCC has taken the position that his claim and a claim by another client of the defendant (the “Herzog claim”), which is proceeding by way of separate action CV-19-00620130 (the “Herzog action”), constitute one Claim for the purposes of the defendant’s responding insurance policy. If CCC is correct and this claim and the Herzog claim are found to be one Claim, the plaintiff argues that his recovery will be more limited. It is more accurate to say that his recovery against the defendant will be the same; what might be limited is the defendant’s available insurance coverage.
- [3] The plaintiff argues that the Herzog action involves a different set of circumstances, on behalf of unrelated parties and is clearly distinct from the relief sought in this action; it is a separate Claim for the purposes of the defendant’s insurance coverage. He proposes to amend his claim to seek a determination in this action of the coverage available to the defendant to satisfy any judgment the plaintiff might obtain, without waiting for the outcome of the Herzog action.
- [4] In the proposed statement of claim, the plaintiff seeks as against CCC:
 - 2(a) a declaration stating the limits of coverage available under the Policies (defined in paragraph 12 below) and determination of any conditions or exclusions affecting the availability of payment thereunder;

(i) Specifically, a declaration and determination that the events giving rise to this action constitute a separate, standalone Claim as defined in the Policies and that no Claim by any other Insured may erode the coverage available to indemnify Mr. Krandel in respect of this action;

2(b) a declaration and determination of the rights of the Plaintiff in respect to payment under the Policies issued by CCC; and

13. The Plaintiff seeks a declaration of his rights of payment in respect to the Policies,

Analysis

- [5] While the threshold to deny an amendment to a pleading is high, I find it is met here. I find that the relief requested in the proposed amendment is very likely not relief the trial judge could grant in this standalone action. I also find that this issue has already been determined by Justice Merritt.
- [6] In February 2024, the defendant commenced an application seeking a declaration that this action and the Herzog action constituted separate claims. The plaintiff and Herzog, who were granted intervenor status, argued that there were two separate claims because the allegations and claims in the two actions were factually distinct in every respect including the relevant taxpayers, the time periods and the subject matter.
- [7] The application was heard on 9 December 2025 and Merritt, J. recently released her decision dismissing it (*Krandel v. CPA Professional Liability Plan Inc. et al*, 2026 ONSC 262). While Her Honour acknowledged that, in some cases, it might be possible to determine the extent of the obligation to indemnify on the basis of the allegations in the claim, in this case, the application for such a determination was premature. She found that whether this claim and the Herzog claim arose “from a common set of circumstances” (the language of the policy) could not be decided until both this action and the Herzog action were finally decided.
- [8] Her Honour held:
- [42] Neither intervenor provided evidence that directly contradicts the allegations in Mr. Krandel’s Statement of Defence, however, even if they did provide evidence to the contrary, it would not be appropriate to resolve this issue in this application *before the facts are found in the underlying actions. (emphasis added)*
- [43] The court will have to determine, *based on the facts found from the evidence adduced*, whether the claims in the Pearl action commenced in 2021 arise from a set of circumstances that are in common with the circumstances giving rise to the Herzog action, which that were first reported to the Insurer or CPA Professional Liability Plan Inc. in 2019 (but within the 2018 Policy Period).

[44] To determine the issues in this Application the court will have to decide factual issues that may also be in issue in the underlying actions and may affect [the defendant's] defence in the underlying actions. This is likely the reason Mr. Krandel was advised by his defence counsel not to answer questions in his cross-examination on this Application. The underlying litigation is the proper forum to make factual determinations regarding the circumstances giving rise to the claims based on a full evidentiary record.

[45] *Once the underlying actions are decided and the facts found*, the Insurer may change its coverage position based on those findings of fact.

[46] It is premature to make findings of fact regarding the commonality, if any, in the circumstances giving rise to the Pearl action and the Herzog action.

- [9] Her Honour found that, in order to decide the coverage issue, the court would have to make factual findings regarding the relationship between this action and the Herzog action and the circumstances giving rise to them. That was best left for determination once both actions had been determined.
- [10] In my view, the trial judge in this standalone action will be in no better position than Merritt, J. was to determine whether this claim and the Herzog claim arise out of a “common set of circumstances” as there will be no evidence before the trial judge in this action about the circumstances of the Herzog claim. As noted by Merritt, J., the scope of coverage available to the defendant in this action cannot be determined prior to the findings of fact in the Herzog action. As such, I find that the plaintiff could not obtain the relief he seeks through this amendment; in short, the claim for the declaration sought is “impossible of success” (*Plante v Industrial Alliance Life Insurance Co.* 2003 CanLII 64295 (ON SC) at paragraph 21(b)).
- [11] Even considering the proposed amended claim on its own, there are no pleaded facts that would allow the trial judge to determine that it constitutes “a separate, standalone Claim as defined in the Policies” or that “no claim by any other Insured may erode the coverage available to indemnify Mr. Krandel in respect of this action”.
- [12] The plaintiff argues that he is following the direction of Merritt, J. in bringing this motion to add CCC. I disagree. I do not read her decision to suggest that a finding on common circumstances in both actions could be made by a trial judge solely in this action, which is what the plaintiff seeks to do through this amendment.
- [13] Further, the findings will not, arguably, bind Herzog as he is not a party to this action. The risk of inconsistent findings is a real one.

Conclusion

[14] For these reasons, the motion is dismissed with costs payable by the plaintiff to the CCC on a partial indemnity basis in the amount of \$15,000.

Associate Justice Jolley

Date: 4 February 2026